92-1032

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BENASA REALTY COMPANY, t/a Wild Acres t/a Wild Acres Country Club t/a Wild Acres, Inc.; BENASA HOLDINGS, INC.; WILD ACRES, INC.; BENASA REALTY COMPANY, c/o First Eastern Bank, N.A.; BENASA INVESTMENTS, INC., c/o Corporation Guarantee and Trust Company; WILD ACRES COUNTRY CLUB, INC.; and WILD ACRES LAKES PROPERTY & HOMEOWNERS ASSOC.

Petitioners

v.

DENNIS MOONEY, MLA MANAGEMENT ASSOCIATES, INC. and MOUNTAIN LEISURE ASSOCIATES,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a federal court of appeals evade the mandates of the Seventh Amendment and Erie Railroad v. Tompkins, 304 U.S. 64 (1938), simply because its decision is rendered in an opinion marked "NOT FOR PUBLICATION"?

Did the Court of Appeals exceed its appellate jurisdiction by rendering a decision which: (1) redetermines the case in a manner inconsistent with the jury's verdict and in contravention of the Seventh Amendment and Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); (2) negates the jury's verdict, that plaintiff had incurred and assumed the risk of his injury by his dive, and mandates a new trial in which the defendants will bear the risk of full liability consequent to plaintiff's dive on the "injury on rescue

not on dive" theory advocated by plaintiff but rejected by the jury; (3) fails to grant to the District Court the deference required for its considerable discretion in formulating jury interrogatories; (4) reverses a valid judgment on the basis of a ruling that the District Court actually did not make; (5) requires a new trial based upon dispositive legal principles formulated by the Court of Appeals contrary to those established by controlling law; and (6) invented testimony not provided by the plaintiff's expert on a crucial element of plaintiff's claims?

May a federal appellate court in a diversity case create its own version of the evidence, the facts, and the law, in contravention of the record, the jury's verdict, and established precedents, to grant its appellant a new trial?

When controlling state law in a diversity case places the burden of establishing apportionment or separate injuries on the party claiming apportionment or separate injuries, may a federal appellate court shift that burden to those who make no such claim?

When a jury has expressly found that the plaintiff assumed the risk of his injury, and that finding is supported by the evidence and untainted by reversible error, may a federal appellate court grant a new trial in which the risk of plaintiff's injury is shifted from the plaintiff to the defendants?

When the jury's verdict necessarily embraces a finding that plaintiff sustained his injury during his dive when his head struck the bottom of the pool rather than during the subsequent rescue, may a federal appellate court order a new

trial to determine whether the injury occurred not at impact in the dive but during the subsequent rescue?

When the trial record plainly shows that a party was permitted to present an issue for the jury's resolution, may a federal appellate court grant that party a new trial on the ground that the party had not been permitted to present the issue?

LIST OF PARTIES

The caption of the case contains the names of all parties currently involved in this case. KDI Corporation and KDI Sylvan Pools, Inc. are not listed, because they have been dismissed.

Petitioners, who were defendants in the District Court and appellees in the Court of Appeals have been collectively referred to as "the Benasa defendants" or "Benasa" in the lower courts and in this petition. Respondent Dennis Mooney was the plaintiff in the District Court and the appellant in the Court of Appeals, and this petition continues the references to him as "plaintiff" or "Mooney". Respondents MLA Management Associates, Inc. and Mountain Leisure Associates were defendants in the District Court and appellees/cross-appellants in the Court of Appeals. This

petition continues the references to them collectively as MLA. The Corporate parties have no unlisted parent companies, subsidiaries or affiliates.

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REFERENCE TO REPORTS OF DECISIONS BELOW

The opinions of the Court of Appeals and of the District Court have not been published, but may be found in the separately bound appendix to this petition, starting at pages 1 and 42, respectively.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals is dated August 31, 1992 (86-88).[1] The Court of Appeals denied petitioners' timely petition for rehearing by its order dated September 29, 1992 (89-91).

This is a timely petition for writ of certiorari, filed within 30 days of the order denying rehearing, Rule 20 of the Rule of the United States Supreme Court. This Honorable Court may review the judgment of the Court of Appeals by

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[1]The numerical references are to the pages of the separately bound appendix to this petition.

writ of certiorari pursuant to 28 U.S.C. §1254(1). This Honorable Court has broad supervisory powers over the judgments of lower federal courts, United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950), may reverse a Court of Appeals and reinstate a District Court judgment, Gibson v. Lochheed Aircraft Service, 350 U.S. 356, 367 (1956), and, in the exercise of such jurisdiction, must see to it that the waters of justice are not polluted, Mesarosh v. United States, 352 U.S. 1, 13 (1959).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of the common law."

Section 1652 of the United States Judicial Code, 28 U.S.C. §1652, provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."[2]

STATEMENT OF THE CASE

A. Jurisdiction of the Lower Courts

The District Court had jurisdiction pursuant to 28 U.S.C. §1332(a) by virtue

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[2]The "laws of the several States" include the judicial decisions of the states' highest courts, Erie Railroad v. Tompkins, 304 U.S. 64 (1938); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 555 (1949).

of the amount in controversy in excess of the required amount and the diversity of citizenship between plaintiff and the defendants. The Court of Appeals, had jurisdiction over the appeals from the District Court's final order and judgment by virtue of 28 U.S.C. §1291.

B. Statement of Facts

Concluding a lengthy and expensive trial,[3] at which plaintiff Dennis Mooney contended that he had made only a shallow "racing" dive into the defendants' swimming pool and that his irreversible quadriplegia was either caused by the defendants' negligence in maintaining or marking the pool's water depth, or was caused when he was rescued, and the

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[3]The trial began on Monday, November 19, 1990, and ended on Wednesday, November 28, 1990, generated a 1,030-page transcript, and cost plaintiff $122,100 according to his attorneys' post-trial affidavits (64); defense expenses raise this total much higher.

defendants countered that plaintiff's quadriplegia happened when his head hit the bottom of the pool and that plaintiff had caused and had assumed the risk of his injury by making a running, nearly vertical dive contrary to his training and experience, the jury returned its verdict by answering the first two special interrogatories, in which they found that the defendants had proven that the act of diving into the pool involved a risk knowingly assumed by plaintiff. The District Court entered judgment for the defendants and rejected plaintiff's motion for a new trial.

Plaintiff then appealed, contending that the District Court erred by admitting deposition excerpts to be read by MLA's attorney, by allegedly foreclosing his "injury on rescue" theory from the jury's consideration, and by

placing on him, rather than the defendants, the burden of proving his claim that he sustained two injuries, an incomplete injury at impact and a complete quadriplegic injury at rescue. In a "NOT FOR PUBLICATION" opinion filed on August 31, 1992, a Panel of the Court of Appeals rejected plaintiff's claim that he was entitled to a new trial "on liability for the dive" because of the deposition excerpts read at trial by counsel for MLA (31), but agreed with plaintiff's arguments "that there was adequate evidence in the record to support a discrete negligent rescue claim, and conclude[d] that the failure to submit it to the jury was prejudicial error" (5). Believing that the negligent rescue claim had been foreclosed from the jury's consideration and that "The jury should, however, have been able to

consider separately the question whether there was a negligent rescue, the risk of which the plaintiff did not assume", (25) the Panel decided to remand the case "for a new trial on the negligent rescue claim against the Benasa and MLA defendants" (40).

In reaching the decision in question, the Panel opinion proceeded on the misbeliefs that the District Court precluded plaintiff from presenting his "exacerbation by rescue" claim to the jury, and that plaintiff had introduced evidence factually sufficient for that claim. The Panel opinion also misapprehended or overlooked these crucial points of law and fact: 1) the threshold issue common to plaintiff's "negligent rescue" claim rejected by the jury and to the "assumption of the risk" defense found by the jury was whether or

not plaintiff's permanent quadriplegia resulted when plaintiff executed a dive that caused that injury at impact with the pool bottom; 2) the District Court did not preclude plaintiff from pursuing his negligent rescue claim to the jury, and plaintiff did present that claim to the jury; 3) the District Court properly exercised its discretion in formulating the jury's special interrogatories; 4) the jury's verdict rejects plaintiff's negligent rescue claim as a matter of established fact; 5) the Panel opinion reviews and effectively negates the jury's verdict in a manner inconsistent with the Seventh Amendment and with its duties as a federal appellate court; 6) as the proponent of apportionment or aggravation, plaintiff had the burden of proving to the jury's satisfaction his contention that his permanent

quadriplegia resulted not from the impact of his body with the bottom of the pool, but from the manner in which he was rescued; 7) the testimony of plaintiff's expert Dr. Kaplan failed to provide a factual basis for the jury to find that plaintiff suffered two injuries, an incomplete spinal injury at impact with the pool bottom and a complete spinal injury during his rescue, or to find that the alleged incomplete injury was not as totally disabling as the complete injury; and 8) the Panel's mandate unconstitutionally upsets an unassailable jury verdict and requires a new trial controlled by principles contrary to established law.

Noting that plaintiff "argues that the district court committed error by refusing to allow Mooney to argue his case as involving separate theories of

liability" (5), the Panel opinion holds "that there was adequate evidence in the record to support a discrete negligent rescue claim, and conclude[s] that the failure to submit it to the jury was prejudicial error" (Id.). The District Court, however, did not preclude plaintiff from submitting his negligent rescue claim to the jury. In mischaracterizing the case as one in which the District Court dismissed and foreclosed jury consideration of plaintiff's "spine board" claim (14), the Panel opinion completely ignores the record, which shows that, although the defendants posited that "it may very well be that it is irrelevant to even argue about it at this point to the jury" (223) and that "the issue of the spine board and lack of use of the spine board should not be argued to this jury" (226), the

District Court explicitly ruled that "I will allow that to remain in the case" (227). Contrary to mistaken belief of the Panel opinion that the District Court sustained defendants' arguments to dismiss (14), the District Court actually rejected defendants' arguments to dismiss plaintiff's rescue claim (221-228). While the Appendix submitted to the Court of Appeals Panel did not contain plaintiff's closing argument to the jury, a review of that transcript reveals that plaintiff's attorney did in fact argue the negligent rescue claim to the jury (215-220).

Although the District Court accurately determined that plaintiff's evidence was inadequate "on separating the injury" and "on which the jury could differentiate the damages" (221), the District Court nevertheless drafted

special jury interrogatories "to put [plaintiff's rescue claim] to the jury in a reasonable and responsible fashion" (Id.), an approach that did in fact "include all of the acts in the concept of negligence, even the concept of comparative negligence and assumption of the risk will work properly, in my judgment, since the guard's conduct would not have happened at all without the Plaintiff's initial conduct" (222).

The District Court's approach allowed the parties to present all of their claims and defenses (except for the emergency and Good Samaritan defenses), and properly focused the jury's attention on the threshold factual issues: the type of dive that plaintiff executed, the injury that that dive inflicted, and plaintiff's appreciation of the risk of that injury. Plaintiff contended and

argued to the jury that he had executed a shallow racing dive and was rendered a complete quadriplegic by the defendant's rescue without the spine board. The defendants proved, however, that plaintiff had executed a nearly vertical dive that produced an impact at the bottom of the pool which shattered plaintiff's cervical spine and caused immediate quadriplegia, an injury which plaintiff voluntarily assumed. The jury was free to accept or reject the parties' respective contentions under the District Court's approach.

The Panel opinion also fails to grant to the District Court the deference for its considerable discretion in formulating jury interrogatories as mandated by cases such as In re Merritt Logan, Inc., 901 F.2d 349, 367 (3rd Cir. 1990), McNally v. Nationwide Ins. Co.,

815 F.2d 254, 266 (3rd Cir. 1987), Healey v. Catalyst Recovery of Penna., Inc., 616 F.2d 641, 648 (3rd Cir. 1980), and DeEugenio v. Allis-Chalmers Mfg. Co., 210 F.2d 409, 414 (3rd Cir. 1954). Had the Panel opinion granted the proper deference, it would have found that the interrogatories were not unfair simply because they did not specifically embrace a particular theory, Merritt Logan, and that the causation issues were subsumed in the interrogatories, McNally, Healey.

Although "acknowledging that the testimony of Dr. Kaplan as to the cause of Mooney's injury was, at times, opaque" (18; emphasis added), the Panel opinion nevertheless discerns "from his testimony a clear indication of his belief that Mooney suffered two distinct injuries: a compression injury, resulting from the impact of the initial dive, and a flexion

injury, resulting from the manner in which Monahan rescued Mooney" (19). The Panel Opinion declares, without citation to the record, that "Kaplan distinguished between the compression injury, which the dive caused, and the flexion injury, which fragmented the bones and irreversibly damaged the spinal cord" (Id.). Unfortunately, there is nothing in the record to support the Panel's declaration.

What the Panel misrepresents as two distinct injuries was actually described by Dr. Kaplan as the two components of the same injury that occurred when plaintiff's head struck the bottom of the pool. On direct examination, plaintiff's attorney asked Dr. Kaplan to assume that plaintiff "received an injury when his head contacted the bottom of the pool" (112; emphasis added), and inquired "what

happens, what happened to his neck, what is the mechanism of the injury, both as to the bone and to the surrounding structures supporting the bone, what happens?" (Id.). The Panel Opinion ignores the focus of the question upon the contact at the bottom of the pool, and Dr. Kaplan's response describing a single injury at that moment:

> "Well, the injury is that there is both impression, that's a vertical loading force down, and flexion to cause the bones to be comminuted in one area more than the other, to fragment one side more than the other, and the spinal column, excuse me, the spine cord, the major nerve wires inside have been in some way compromised" (Id.; emphasis added).

Instead of the two separate injuries from two separate forces invented by the Panel, Dr. Kaplan's testimony, like that of the defense expert, actually delineated a single spinal cord injury produced by the coincidence of the

compressive and flexion forces generated when plaintiff's head hit the bottom of the pool, causing, inter alia, plaintiff's C-4 vertebra to break off a piece of his C-5 vertebra and wedge it between the C-4 and C-6 vertebrae mechanically traumatizing and disrupting the spinal cord in a C-6 complete nerve injury (180-203). The following detailed, chronological review of Dr. Kaplan's testimony reveals that he provided no factual basis for plaintiff's "aggravation" claim or for the Panel opinion.

Dr. Kaplan was qualified (94) and offered (102) by plaintiff as an expert in rehabilitative medicine with respect to spinal injuries, and he acknowledged that: he had no engineering degree (98); had no degree in radiology and was not a radiologist (Id.); was not licensed as a

neurologist or as an orthopedic surgeon (98-99); had no biomechanical engineering degree (99); and was not a physicist, a mechanical engineer or the plaintiff's treating physician (Id.).

Dr. Kaplan stated that he had broken his neck and had sustained an "incomplete" spinal injury when he was seventeen years old (93). Dr. Kaplan explained that a "complete" spinal injury is one in which there is no motor or sensory function existing after 24 hours, and that an "incomplete" spinal injury is one in which there is some motor or sensory function extant after 24 hours after the accident (115), and he gave himself as an example of an incomplete spinal injury (115-116). Dr. Kaplan did not, however, relate the circumstances of his injury: how it occurred, what was done for him, whether his bones were

broken or whether his spinal cord was severed or injured; and he never compared those circumstances with the circumstances of plaintiff's injury.

While Dr. Kaplan stated that he was able to place a person within the general categories of complete and incomplete spinal injuries, he admitted that it is "very difficult to predict" the future of an incomplete spinal injury, that the "function can be anything from partial to complete recovery", and that "each case then becomes a very individual matter" (116). At no time did Dr. Kaplan explain whether plaintiff's theoretical incomplete injury would have resulted in a partial or a complete recovery, nor did he explain to what degree plaintiff would have remained disabled had a spine board been used.

When Dr. Kaplan examined plaintiff

in connection with his January 25, 1990 report, in which, as even plaintiff's counsel agreed, he was of the opinion that plaintiff had sustained an immediate spinal cord injury not a removal injury (175), Dr. Kaplan concluded that plaintiff's injury was a complete spinal injury (117). At this juncture the questions and answers quoted by the Panel opinion occurred:

> "Q. Okay. Now, Doctor, I want you to assume that no spine board was used in removing this man from the pool. Are you able to express an opinion regarding whether or not the failure to use a spine board was a significant factor in making him a complete spinal injury?
>
> "A. Yes, I am.
>
> "Q. What is that opinion?
>
> "A. I believe that it was a significant factor in making him a complete injury.
>
> "Q. When you say, 'I believe', is that speculative or with reasonable medical certainty?
>
> "A. That is with reasonable medical

certainty.

"Q. And by the words, 'I believe,' you mean that it's your opinion?

"A. Yes." (117-118)

Within both the primary question and the conclusionary, non-factual opinion is the assumption that the impact with the pool bottom produced only an incomplete spinal injury. At no point in Dr. Kaplan's testimony did he state that the initial injury was only incomplete and not complete, and he did not give the factual bases, if any, for this opinion.

On cross-examination by the Benasa attorney, Dr. Kaplan read the emergency room report and the Bellevue Hospital Center history (163-166). Nothing in this examination provided the jury with a factual basis to find that plaintiff had sustained only an incomplete spinal injury when he struck the bottom of the pool. On the contrary, the emergency

room report related "spinal cord injury with quadriplegia due to C-5 compression fracture without significant subluxation" (165), and the Bellevue record related "The patient is a 20 year old white male who hit the bottom of a swimming pool at 5:00 p.m. after dive and became immediately quadriplegic" (166).

None of those deficiencies was cured by the detailed cross-examination of Dr. Kaplan by counsel for MLA (167-207). Rather, that testimony elicited further confirmation of the defense contention that plaintiff rendered himself a permanent quadriplegic when his neck fractured as he hit the bottom of the pool. Dr. Kaplan confirmed that the defendant's expert's conclusion, that the cervical spine injury is the direct result of the diving accident, was consistent with the Bellevue report of

immediate quadriplegia at that moment (174). Dr. Kaplan stated that "The nerve injury would be described as C-6 complete" (180; emphasis added).

In fine detail, Dr. Kaplan confirmed the fractures of the bones of plaintiff's neck and the mechanism of injury which traumatized the spinal cord due to the flexion and compression forces developed when plaintiff hit the bottom of the pool (180-203). Although Dr. Kaplan also confirmed that plaintiff's neck became unstable because the ligaments were also damaged by the contact with the bottom of the pool, he never stated that this instability caused the quadriplegia. Dr. Kaplan admitted that he did not know whether the flexion preceded the compression or whether plaintiff was changing the position of his head when he impacted the bottom of the pool, because

this was beyond Dr. Kaplan's filed of expertise.

On redirect examination, plaintiff's attorney elicited the concept of "spinal shock" to suggest that the emergency room report of immediate quadriplegia was premature (211), but Dr. Kaplan admitted that the term "does not speak to the issue of whether it is complete or incomplete" (211-212) and that the emergency room report indicates when the paralysis began (Id.). Nothing on redirect examination provided a factual foundation for plaintiff's contrary proposition that the paralysis began later during the rescue attempt. Dr. Kaplan did not provide a factual basis for plaintiff's "aggravation" claim, contrary to the Panel opinion.

Claiming that "nothing in Pennsylvania jurisprudence suggests that

plaintiff's inability to apportion damages deprives that plaintiff of a remedy" (22), the Panel Opinion holds that "plaintiff must merely show that there were, in fact, two separate causes" (22-23) shifting the burden "to the defendants to show which defendants had caused what percentage of Mooney's injuries" (23). The Panel opinion notes that "Although Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976), relied on by defendants, might lead to a different result, Huddell turns on New Jersey law, and hence is inappropriate in this case, which is governed by Pennsylvania law" (24, n.6). On these points, the Panel Opinion invents its own law, contrary to controlling Pennsylvania law, and departs from its mandate to decide cases in accordance with the Court of Appeals' own precedents and prevailing state law, and

in the process depriving the appellee of equal protection of the law, Eric R. Co. v. Tompkins, 304 U.S. 64, 75, 58 S.Ct. 817, 820-1 (1938); 28 U.S.C. §1652.

Although it cites and purports to follow Martin v. Owens-Corning Fiberglas Corp., 515 Pa. 377, 528 A.2d 947 (1987), the Panel Opinion ignores and contradicts the basic rule, stated in Martin, that "the burden of proving apportionment rests on the party seeking it", 528 A.2d at 949. The Panel opinion also does not mention and conflicts with the prior opinion of the Court of Appeals in Borman v. Raymark Industries, Inc., 960 F.2d 327, 331 (3rd Cir. 1992), which echoed that "'[T]he burden of proving apportionment rests on the party seeking it.' Martin II, 515 Pa. at 382, 528 A.2d at 949 (citing Restatement (Second) of Torts §433B(2))." See also,

Bryant v. Girard Bank, 358 Pa. Super. 335, 517 A.2d 968, 975 (1986)(under §433(B)(2) the burden of proof is on the party seeking apportionment); Wade v. S.J. Groves, 283 Pa. Super. 464, 424 A.2d 902, 907 n.2 (1981)(same).

In placing upon defendants the burden "to avoid full liability by apportioning damages and showing that they are responsible only for a given portion of plaintiff's damages" or showing "which defendants had caused what percentage of Mooney's injuries" (23), the Panel opinion, which provides no precedent for its declaration, contradicts established law.

In practical effect, the Panel opinion also negates the jury's verdict by compelling a new trial where the defendants bear the risk of "full liability" consequent to plaintiff's

dive, even though the jury has already determined that plaintiff himself assumed the risk of his injury, and guarantees plaintiff a full recovery because the defendants can do no more, under the Panel opinion's restrictions, than "show which defendants had caused what percentage of Mooney's injuries". The Panel opinion was not free to view or redetermine the case in a manner inconsistent with the jury's verdict, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780 (1962). But the Panel opinion does just that by failing to recognize that the jury reached its verdict only because it found that plaintiff rendered himself a permanent quadriplegic when his head hit the bottom of the pool, and then by remanding for a new trial that ensures plaintiff of the recovery to which the

jury has said he is not entitled, and on the "injury at rescue" claim that the jury rejected.

Furthermore, contrary to the declaration of the Panel opinion, Pennsylvania jurisprudence has long recognized that a plaintiff who is unable to prove his or her aggravation of injury claim is not entitled to a verdict on that claim. Offensend v. Atlantic Refining Co., 322 Pa. 399, 185 A. 745 (1936), cited in Martin, 528 A.2d at 949, and in Pavorsky, 148 A.2d at 103, but overlooked by the Panel opinion, represents a clear instance in which a plaintiff received no remedy beyond the scope of medical testimony, because "If the doctor were not in a position to make an estimate of the extent of the aggravation in point of time, the jury should not have been allowed to hazard a

guess beyond the period shown with reasonable certainty", 185 A. at 747.

In addition, the Panel opinion's disregard of Huddell v. Levin as inapposite to cases governed by Pennsylvania law, conflicts with the prior published opinions rendered by the Court of Appeals in Habecker v. Clark Equipment Co., 942 F.2d 210, 214 (3rd Gir. 1991), and in Roe v. Deere and Co., 855 F.2d 151, 153 n.2 (3rd Cir. 1988), which held that Huddell is applicable to cases governed by Pennsylvania law. Application of the Huddell approach to a case in which the plaintiff claims damages for "second collision" injuries or for aggravated injuries or for damages beyond those sustained by conduct for which the defendants are not responsible is consistent with the basic rule that the burden of proving apportionment or

aggravation is accorded to the party invoking it. Application of those principles by the Panel in this case would have affirmed the judgment that the Panel now vacates because plaintiff failed to provide the jury with sufficient facts to find that his injury was exacerbated on rescue and that his subsequent losses were greater than those that would have flowed from the initial injury at the bottom of the pool, for which he alone has properly been held responsible.

ARGUMENT

This Honorable Court should issue a writ of certiorari to review and reverse the new trial mandate of the Court of Appeals and to reinstate the judgment of the District Court, because the Court of Appeals so far departed from the accepted and usual course of judicial proceedings

as to call for the exercise of this Honorable Court's power of supervision.

Although required to follow controlling state law, the Court of Appeals departed diametrically from it. Although state law placed the burden of proof on the plaintiff, the Court of Appeals placed it on the defendants. Although required to construe the evidence in favor of the jury's verdict and to uphold the jury's verdict in the absence of prejudicial error, the Court of Appeals invents and emphasizes evidence contrary to the jury's verdict and sets the jury's verdict aside simply because the Court of Appeals thought that the jury's result was wrong. Although the Court of Appeals believed that plaintiff's negligent rescue claim had been dismissed, the record shows unquestionably that the claim was not

dismissed but rather was presented to but rejected by the jury. Although the Court of Appeals purports not to grant a new trial on the jury's verdict "on liability for the dive", its decision completely undermines the jury's verdict, which plead such liability exclusively on plaintiff, by ordering a new trial to shift that responsibility to the defendants.

Had the Court of Appeals followed the accepted and usual course of judicial proceedings by applying rather than contradicting established state law, by respecting rather than negating the jury's verdict, and by adhering to rather than creating its own record, the Court of Appeals would and should have affirmed the judgment of the District Court entered pursuant to the jury's verdict in the defendants' favor.

CONCLUSION

For these reasons, the Benasa appellees respectfully ask that this Honorable Court issue a writ of certiorari to the Court of Appeals, reverse the decision of the Court of Appeals granting a new trial, and reinstate the jury's verdict and the District Court's judgment.

Respectfully submitted,

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DATED: 11/27/92